



## **DETERMINATION OF MERGER NOTIFICATION M/12/006 - AIRTRICITY/PHOENIX**

### **Section 21 of the Competition Act 2002**

**Proposed acquisition by SSE plc, through Airtricity Energy Supply (Northern Ireland) Limited and Airtricity Limited, of Phoenix Supply Limited, Phoenix Energy Limited and Phoenix Energy Supply Limited**

**Dated 15 June 2012**

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### **Introduction**

1. On 16 May 2012, the Competition Authority, in accordance with Section 18 of the Competition Act, 2002 ("the Act"), was notified, on a mandatory basis, of a proposal whereby SSE plc ("SSE" or the "Acquirer") would acquire sole control through Airtricity Energy Supply (Northern Ireland) Limited ("AESNI") and Airtricity Limited ("Airtricity") of Phoenix Supply Limited ("PSL"), Phoenix Energy Limited ("PEL") and Phoenix Energy Supply Limited ("PESL") (together the "Target") from Terra Firma Capital Partners ("Terra Firma") (the "Vendor").

### **The Undertakings Involved**

#### *The Acquirer*

#### SSE

2. SSE is an energy company with operations in the United Kingdom and on the island of Ireland.
3. SSE is involved in the business of electricity generation in the United Kingdom and the island of Ireland with currently 11,330MW of electricity generation capacity. Approximately 410MW of this generation capacity can be attributed to the State.
4. SSE is also involved in the businesses of electricity transmission and distribution in northern Scotland and of electricity distribution in central and southern England. SSE is not, however, involved in the business of electricity transmission or distribution in the island of Ireland.<sup>1</sup>
5. SSE also supplies electricity to residential and business customers in the United Kingdom. SSE supplies electricity to residential and business customers in Northern Ireland through its subsidiary AESNI. SSE supplies electricity to residential and business customers in the State through its subsidiary Airtricity.

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<sup>1</sup> Electricity transmission and distribution systems encapsulate the infrastructure through which the transmission and distribution of electricity occurs. In the State, Electricity Supply Board ("ESB") is the licensed owner of the electricity transmission system. EirGrid plc, a state-owned commercial company and independent of ESB, is the designated licensed operator of the electricity transmission system. The electricity distribution system in the State is owned and operated by ESB Networks, a subsidiary of ESB.

6. SSE is a participant in the wholesale gas market in the United Kingdom. SSE, however, does not sell gas in any wholesale market on the island of Ireland.
7. SSE also supplies gas to residential and business customers in the United Kingdom. However, it does not currently supply gas to any customers in Northern Ireland. SSE also supplies gas to residential and business customers in the State through its subsidiary Airtricity.
8. For the financial year ending 31 March 2011, SSE had worldwide turnover of €32,647.6 million<sup>2</sup> and a turnover in the State for the same period of €[...] million.

#### AESNI

9. AESNI, a wholly-owned subsidiary of SSE, operates under a licence from the Utility Regulator of Northern Ireland ("the Utility Regulator") and supplies electricity to residential and business customers in Northern Ireland. It has approximately [...] residential electricity customers and [...] business electricity customers in Northern Ireland. It does not currently supply gas to any customers in Northern Ireland.

#### Airtricity

10. Airtricity, a wholly-owned subsidiary of SSE, operates under a licence from the Commission for Energy Regulation ("CER") and supplies electricity and gas to residential and business customers in the State. It has [...] electricity customers in the State (of which [...] are residential customers and [...] are business customers). Airtricity is the third biggest supplier of electricity to residential customers in the State behind Electric Ireland and Bord Gais.<sup>3</sup> Airtricity is the third biggest supplier of electricity to business customers in the State behind Electric Ireland and Energia.<sup>4</sup> Airtricity has [...] gas customers in the State (of which [...] are residential customers and [...] are business customers). Airtricity is the seventh biggest supplier of gas to customers in the State behind Bord Gais, Energia, Vayu, Gazprom, Flogas and PEL.<sup>5</sup>

#### *The Vendor*

#### Terra Firma

11. Terra Firma is a private equity firm based in the United Kingdom which raises funds from large institutional investors such as insurance companies, endowments, charitable foundations, and public and private pension funds. Terra Firma, amongst other things, owns and controls Kellen Investments Limited (a holding company), which in turn owns and controls Phoenix Energy Holdings Limited ("Phoenix Holdings"). Phoenix Holdings is the parent company of PSL, PEL and PESL.

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<sup>2</sup> Based on the European Central Bank €/GBP£ bilateral exchange rate for 2011 of €1/GBP£0.867.

<sup>3</sup> Electricity and Gas Retail Markets Annual Report 2011, CER/12/072, available at <http://www.cer.ie/en/electricity-retail-market-reports-and-publications.aspx?article=b0ba4820-3227-499f-9879-16de76bdd5b0>

<sup>4</sup> Ibid 3.

<sup>5</sup> Ibid 3.

12. Phoenix Energy Services Limited ("PES"), also a subsidiary of Phoenix Holdings, provides ancillary home energy services (including gas boiler maintenance and repair services and carbon monoxide detection) to its residential customers in Northern Ireland. PES, however, does not form part of the business to be acquired.

#### *The Target*

13. The Target comprises PSL, PEL and PESL. However, PESL does not currently carry on any trading activity.

#### PSL

14. PSL, a wholly-owned subsidiary of Phoenix Holdings, operates under a licence from the Utility Regulator and supplies gas to approximately 130,000 residential and business customers in the Greater Belfast area from the Phoenix Natural Gas Distribution network.<sup>6</sup> In addition, PSL trades approximately 110 million therms of natural gas per annum on the wholesale gas market in the United Kingdom. PSL is not involved in the business of electricity generation, transmission, distribution or supply on the island of Ireland.

#### PEL

15. PEL, a wholly-owned subsidiary of Phoenix Holdings, operates under a licence from the CER and commenced trading in the State in November 2009. It currently supplies gas to [...] business customers in the State. However, it does not supply gas to any residential customers in the State. PEL is not involved in the business of electricity generation, transmission, distribution or supply on the island of Ireland.
16. For the financial year ending 31 December 2011, PSL and PEL had a combined worldwide turnover of €[...] million and a combined turnover in the State for the same period of €[...] million.

#### **Rationale for the Proposed Transaction**

17. The parties submit that "the proposed transaction will facilitate the Purchaser (and SSE) developing its gas offering in Northern Ireland and to the ultimate benefit of an established customer base."<sup>7</sup>

#### **Third Party Submissions**

18. The Authority received one third-party submission during its Phase 1 investigation from a business located in Northern Ireland. The submission raised concerns about the impact of the proposed transaction on competition in the energy sector in Northern Ireland and the service received from suppliers in Northern Ireland. The Authority confirmed the particulars of the submission with the business and referred it to the appropriate bodies in the United Kingdom and Northern Ireland.

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<sup>6</sup> Phoenix Natural Gas Distribution network does not form part of the proposed transaction.

<sup>7</sup> Notification Form page 11.

## Views of Regulators

19. The Authority consulted with CER in relation to the proposed acquisition. CER is the independent regulator of the electricity and natural gas sectors in the State. CER indicated to the Authority that it does not have any concerns regarding the proposed acquisition.
20. The Authority also consulted with the Utility Regulator in relation to the proposed acquisition. The Utility Regulator is an independent non-ministerial government department which regulates the Electricity, Gas and Water and Sewage industries in Northern Ireland. The Utility Regulator indicated to the Authority that it does not have any competition concerns regarding the proposed acquisition. The Utility Regulator also stated that although Airtricity does hold a gas supply licence, it does not currently have any gas customers in Northern Ireland.
21. Both regulators were very helpful during our investigation.

## Industry Background – Retail Supply of Gas

22. The parties informed the Authority in the notification that since there are few natural gas resources in the State, most of the gas consumed is purchased on international gas markets and imported through the natural gas network or through pipes which connect the State with the United Kingdom. Gas purchasers in the State are therefore exposed to fluctuations in international gas prices. Airtricity and AESNI acquire their gas supply from SSE. [...]
23. Currently there is no single all island retail gas market similar to the Single Electricity Market. All suppliers of gas to the retail market in the State must hold both a Gas Supply<sup>8</sup> and a Gas Shipping<sup>9</sup> Licence from the CER. The holder of such licences can supply to all the retail segments in the State identified at paragraph 25 below provided the licence holder complies with the conditions of its licence.<sup>10</sup>
24. The retail supply of gas in the State is divided into two segments - business and residential - and has historically been dominated by Bord Gáis Energy which was the incumbent monopoly supplier of gas. The business segment of the retail gas market was opened to full competition in July 2004. The residential segment was opened to full competition in July 2007.
25. The CER publishes a quarterly review of the retail gas market in the State. In its Q3 2011 review of the retail gas market, it reports market share data (both volume and customer numbers) for each of the following six segments:<sup>11</sup>

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<sup>8</sup> A gas supplier processes the sale of gas to individual customers. This definition is taken from the CER website at: <http://www.cer.ie/en/gas-retail-market-licences.aspx>

<sup>9</sup> A gas shipper is responsible for liaising with Bord Gáis Networks to ensure that gas is delivered to individual homes and premises. They act like a middle person between the Bord Gáis Networks and the supplier. This definition is taken from the CER website at: <http://www.cer.ie/en/gas-retail-market-licences.aspx>

<sup>10</sup> Currently, 4 of the 8 suppliers of gas to the retail market in the State have not satisfied the respective licence conditions permitting them to supply to the residential retail market. This information was provided to the Authority by the CER.

<sup>11</sup> Review of the Regulatory Framework for the Retail Gas Market, Competition Review Q3 2011, CER/11/217, available at

- a) Power Generation – business customers with an annual gas consumption greater than 135 million standard cubic meters;<sup>12</sup>
  - b) Above Regulated Tariff (RTF) – business customers with an annual gas consumption greater than 264 GWh;<sup>13</sup>
  - c) RTF – business customers consuming between 5.5GWh and 264GWh of gas per annum.<sup>14</sup>
  - d) Fuel Variation Tariff (“FVT”) - this applies to business customers who consume between 73,000 KWh and less than 5.5 GWh per annum of gas and have a supply point capacity of more than 3,750 KWh;<sup>15</sup>
  - e) Non-Daily Metered Industrial and Commercial (“NDM I&C”) – I&C customers who consume between 3,750 KWh and 73,000 KWh per annum of gas;<sup>16</sup> and,
  - f) NDM residential - these are residential (i.e., non-business) customers.
26. The following suppliers have entered the business segment of the retail gas market in the State since 2004: Vayu (2004), Energia (2005), Flogas (2007), Airtricity (2008), Gazprom (2008), Electric Ireland (2009), and PEL (2009).
27. Bord Gais Energy’s leading position in the business segment of the retail supply of gas has been eroded since liberalisation in 2004 as evidenced by the fact that its market share in this segment has fallen from 61% to 39% between 2009 and 2011 (see Table 1 below).

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<http://www.cer.ie/en/gas-retail-market-reports-and-publications.aspx?article=5dfb2bfb-4fc3-4947-90ce-1950e26a9b11>

The subsequent quarterly reviews of the retail gas market published by the CER (Q4 2011 and Q1 2012) only report market share data for residential gas customers.

<sup>12</sup> This definition was provided to the Authority by the CER. The CER reports on page 20 of CER/11/217 that there were 17 customers in this segment in the State in 2011.

<sup>13</sup> This definition was provided to the Authority by the CER. The CER reports on page 20 of CER/11/217 that there were 4 customers in this segment in the State in 2011.

<sup>14</sup> This definition was provided by the CER at page 7 of Decision Paper CER/08/197 available at <http://www.cer.ie/GetAttachment.aspx?id=c72106dd-3529-4b91-8861-d247ee4d1261>

Page 10 of CER/08/197 states that “In defining the ‘relevant market’, the Commission is providing an operational definition, which is not necessarily a legal definition as per competition law.”

The CER reports on page 20 of CER/11/217 that there were 247 customers in this segment in the State in 2011.

<sup>15</sup> This definition was provided to the Authority by the CER. The CER reports on page 20 of CER/11/217 that there were 1,716 customers in this segment in the State in 2011.

<sup>16</sup> This definition was provided to the Authority by the CER. The CER reports on page 20 of CER/11/217 that there were 22,659 customers in this segment in the State in 2011.

**Table 1: Retail Supply of Gas to Business Customers (excluding Power Generation Customers)<sup>17</sup> by Volume (GWh) %, 2009-2011, the State**

<b>Supplier</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Bord Gais Energy	61	47	39
Energia	24	27	19
Vayu	10	12	14
Gazprom	3	6	9
Flogas	1	3	7
<b>PEL</b>	-	<b>3</b>	<b>6</b>
<b>Airtricity</b>	<b>0.4</b>	<b>2</b>	<b>4</b>
Electric Ireland	0.1	0.1	3
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

Source: The 2009 and 2010 market share figures are calculated using data provided in Gas Market Update – 2010, CER/11/020. The 2011 market share figures were provided to the Authority by the CER.

28. The retail gas market in the State has been characterised by a high level of customer switching mainly from Bord Gais Energy. 161,519 customers (residential and business) switched away from Bord Gais Energy to a rival supplier between January 2010 and December 2011.<sup>18</sup>

### **Competitive Assessment**

29. The proposed transaction does not raise any vertical competitive concerns. There is no vertical relationship between the parties in the State.

30. The parties overlap horizontally only in the retail supply of gas to business customers in the State. With respect to the retail segments listed in paragraph 25 above, neither Airtricity nor PESL supply gas to customers in the Power Generation and Above RTF segments. PEL does not supply gas customers in the Power Generation segment but has one customer in the Above RTF segment. Thus, the parties overlap only with respect to the following three segments of the retail business gas market in the State:

- NDM I&C
- FVT; and,
- RTF.

31. On 7 June 2011, the CER published the decision paper titled "Roadmap for Deregulation in the Non-Daily Metered Retail Gas Market."<sup>19</sup> This document sets out the framework for how and when the non-daily metered retail gas market in the State would be deregulated. In the roadmap, the CER concluded that the NDM gas retail market will be defined by three relevant product markets:

<sup>17</sup> When calculating market share data in the retail supply of gas to business customers in the State, the CER excludes gas sold by retailers to Power Generation customers. If gas sold to Power Generation customers is included when calculating market share data, the market shares of both PEL and Airtricity fall to less than 1% since neither company sells gas to Power Generation customers in the State.

<sup>18</sup> Review of Regulatory Framework for the Retail Gas Market, Competition Review Q4 2011, CER/12/012, page 11.

<sup>19</sup> CER/11/071, available at

[http://www.cer.ie/en/gas-retail-market-current-consultations\\_.aspx?article=8ea82436-fc04-4649-9ac7-650bd7def620](http://www.cer.ie/en/gas-retail-market-current-consultations_.aspx?article=8ea82436-fc04-4649-9ac7-650bd7def620). See page 16.

- FVT
  - NDM I&C; and,
  - NDM residential.
32. Respondents to the CER consultation paper on the Road Map accepted CER's views on the defined relevant retail product markets for gas. CER also noted that "Respondents also support the geographic market definition as outlined in the consultation paper."<sup>20</sup>
33. For the purpose of examining the competitive effects of the proposed transaction, the Authority will examine the competitive impact of the proposed transaction in each of these three segments of the retail business gas market in the State. The Authority, however, does not need to come to a definitive view on the relevant product or geographic market because its conclusions concerning the competitive effects of the proposed transaction, outlined below, would be unaffected whether the relevant product market is narrow or broader. (In this instance, broadening the market would result in reducing the Target's presence and further lessening any competitive concerns.)

#### ***FVT and NDM I&C Segments***

34. As illustrated in Tables 2 and 3 below, both Airtricity and particularly Phoenix have a very small share of the FVT and NDM I&C segments of the retail business gas market in the State.

**Table 2: FVT by Volume (GWh) %, Q2 2010-Q2 2011, the State**

Supplier	Q2 2010	Q3 2010	Q4 2010	Q1 2011	Q2 2011
Bord Gais Energy	58	57	54	45	43
Energia	24	25	27	30	30
Vayu	12	11	12	13	14
Flogas	6	7	7	10	11
<b>Airtricity</b>	-	<b>0</b>	<b>0</b>	<b>2</b>	<b>2</b>
<b>Phoenix</b>	-	-	-	<b>0</b>	<b>0</b>
Electric Ireland	-	-	-	-	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

Source: Review of Regulatory Framework for the Retail Gas Market, Competition Review Q2 2011, CER/11/134

**Table 3: NDM I&C by Volume (GWh) %, Q2 2010-Q2 2011, the State**

Supplier	Q2 2010	Q3 2010	Q4 2010	Q1 2011	Q2 2011
Bord Gais Energy	51	49	47	40	39
Energia	39	40	41	42	42
Vayu	3	3	3	3	3
Flogas	7	8	9	14	15
<b>Airtricity</b>	-	<b>0</b>	<b>0</b>	<b>1</b>	<b>1</b>
<b>Phoenix</b>	-	-	<b>0</b>	<b>0</b>	<b>0</b>
Electric Ireland	-	-	-	-	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

Source: Review of Regulatory Framework for the Retail Gas Market, Competition Review Q2 2011, CER/11/134

<sup>20</sup> Ibid 19.

35. The CER reports that on 1 October 2011 Phoenix had only two FVT customers (out of a total of 1,716) and three NDM I&C customers (out of a total of 22,659) in the State.<sup>21</sup> Post-acquisition, there will be only an insignificant increase in the combined market share of Airtricity and Phoenix. Airtricity's pre-acquisition market position will remain unaffected in both the FVT and NDM I&C business segments in the State. Airtricity will continue to face competition in both segments from suppliers such as Bord Gais Energy, Energia, and Flogas.

## Conclusion

36. In the light of the above, the Authority considers that the proposed transaction does not raise competition concerns in either the FVT or the NDM I&C segments of the retail supply of gas to business customers in the State.

## RTF Segment

37. Table 4 below details the merging parties' share of the RTF segment of the retail business gas market in the State.

**Table 4: Total RTF by Volume (GWh) %, 2009-2011, the State**

Supplier	2009	2010	2011
Bord Gais Energy	40	35	24
Energia	33	28	23
Vayu	18	19	19
Gazprom	8	13	18
<b>Airtricity</b>	<b>1.1</b>	<b>3.3</b>	<b>5.8</b>
<b>Phoenix</b>	<b>0.1</b>	<b>0.5</b>	<b>5.2</b>
Electric Ireland	0.1	1.2	5
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

Source: CER

38. The market shares of Gazprom, Airtricity, Phoenix, and Electric Ireland have grown considerably since 2009 at the expense of both Bord Gais Energy and Energia. Post-acquisition, Airtricity will have an 11% share of the RTF sector. However, Airtricity will remain the fifth biggest supplier of gas in the RTF sector in the State post-acquisition.
39. Market concentration refers to the degree to which production in a particular market or industry is concentrated in the hands of a few large firms. The most commonly used measure of concentration is the Herfindahl-Hirschman index (HHI), which is defined as the sum of the squares of the market shares of all firms participating in the market. The pre-proposed transaction HHI is 1,876 while the HHI post-transaction is 1,936. The change in the HHI is 60.
40. The HHI results would put the transaction in Zone B as defined by the Competition Authority's *Merger Guidelines*.<sup>22</sup> In other words, the RTF segment of the retail business gas market in the State post-transaction would be defined as moderately concentrated. The *Merger Guidelines* states that "Mergers falling in zone B may raise significant competitive

<sup>21</sup> Review of Regulatory Framework for the Retail Gas Market, Competition Review Q3 2011, CER/11/217, page 20.

<sup>22</sup> Full details of the HHI are explained in the Competition Authority, 2004, *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004. This document is available on [www.tca.ie](http://www.tca.ie).



concerns.”<sup>23</sup> Having established a zone B merger, the Authority obtained the views of customers in order to establish whether the proposed transaction is likely to raise any significant competitive concerns.

#### *Views of Customers*

41. The Authority sent a questionnaire to each of the merging parties’ top five RTF customers in the State. The questionnaire consisted of questions about the respondent’s experience with buying gas and its views about the proposed transaction.
42. Sales of gas by Airtricity to its top five RTF customers accounted for [...] % of total RTF gas sales by Airtricity in the State in 2011. Sales of gas by Phoenix to its top five RTF customers accounted for [...] % of its total RTF gas sales in the State in 2011.
43. All ten customers returned a completed questionnaire to the Authority. No competition concerns were expressed by any customer in relation to the retail supply of gas. When asked to list other credible potential suppliers of gas, all ten customers listed some or all of the following alternative suppliers: Bord Gais Energy, Energia, and Vayu.
44. An assessment of the views of customers suggests that the proposed acquisition is not likely to raise significant competitive concerns in the RTF segment of the retail supply of gas to business customers in the State.

#### **Conclusion**

45. The Authority considers that the proposed transaction does not raise significant competitive concerns in the RTF segment of the retail supply of gas to business customers in the State, a view that is in accord with the views of customers and regulators. We reach this conclusion by considering the relatively modest increase in concentration, the pattern of entry and switching, and the nature of the market and competition within it, as well as the views expressed to us.

#### **Ancillary Restraint**

46. The acquirer and the vendor have entered into a non-compete obligation for a period of [...] months and in relation to the territory of Northern Ireland following signature of the Share Purchase Agreement. The acquirer submits that this is essential as the proposed transaction involves the transfer of goodwill and know-how from the vendor to the acquirer. The Authority considers that these restrictions are directly related to and necessary for the implementation of the proposed transaction.

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<sup>23</sup> Ibid 22, paragraph 3.10, page 11.

## **DETERMINATION**

The Competition Authority, in accordance with Section 21(2) of the Competition Act, 2002, has determined that, in its opinion, the result of the proposed acquisition whereby SSE plc will acquire sole control through Airtricity Energy Supply (Northern Ireland) Limited and Airtricity Limited of Phoenix Supply Limited, Phoenix Energy Limited and Phoenix Energy Supply Limited will not be to substantially lessen competition in any market for goods or services in the State and, accordingly, that the acquisition may be put into effect.

### **For the Competition Authority**

Stephen Calkins  
Member of the Competition Authority  
Director, Mergers Division